Supreme Court, U.S.
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90-1739

No. _____

In The

Supreme Court of the United States

October Term, 1990

FUQUA INDUSTRIES, INC., a Delaware corporation; QUALEX INC., a Delaware corporation, as successor by merger to COLORCRAFT CORPORATION, a North Carolina corporation,

Petitioners,

v.

RUTH F. JANDRUCKO, individually,

Respondent.

Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE UNITED STATES CONSTITUTION PERMITS A FLORIDA JUDGE OF COMPENSATION CLAIMS TO AWARD WORKERS' COMPENSATION BENEFITS FOR AN ALLEGED DISABILITY WHICH IS A REFUSAL TO ASSOCIATE WITH BLACK PERSONS IN THE WORK PLACE.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 4

HOW FEDERAL QUESTIONS WERE RAISED AND PASSED ON BELOW 5

REASONS FOR GRANTING WRIT 7

CONCLUSION 13

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605, 109 S.Ct. 2037 (1989) 3

Bob Jones University v. United States, 461 U.S. 574, 103 S.Ct. 2017 (1983) 6, 7, 11, 12

Boucher v. Orleans Parish School Board, 346 So.2d 1124 (La. 4th Cir. 1977) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706 (1989) 6

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 2

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461 (1964) 9

Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) 1

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S.Ct. 422 (1923) 13

Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967) 6

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 9

Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804 (1973) 6

Ortega v. Owens-Corning Fiberglas Corp., 409 So.2d 530 (Fla. 1st DCA 1982) 2

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879 (1984) 1, 8, 9, 10, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1981) 8

Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) 12

Rollins v. Southern Bell Telephone & Telegraph Co., 384 So.2d 650 (Fla. 1980) 2

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 2

Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st DCA 1983) 2

Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948) ...6, 7

Wood v. Orange County, 715 F.2d 1543, reh. den., 720 F.2d 1294 (11th Cir. 1983), cert. den., 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984) 2

OTHER AUTHORITIES

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 1

42 U.S.C. § 2000e 4, 10

440.271, Fla. Stat. 1

Florida Workers' Compensation Code, ch. 440, Fla. Stat. 5

U.S. Const., amend. XIV, § 1 ..... *passim*

Supreme Court Rule 10.1(c) 14

OPINIONS BELOW

The Judge of Compensation Claims entered his Order on April 26, 1990 (Appendix A, App. 1). The Judgment of the Florida First District Court of Appeal, affirming without opinion, was entered on February 25, 1991 (Appendix A, App. 13). Rehearing en banc was dismissed on March 20, 1991 (Appendix A, App. 14). The mandate of the First District Court of Appeal issued on March 27, 1991 (Appendix A, App. 16).

JURISDICTION

This Petition for a Writ of Certiorari was filed within ninety (90) days of the February 25, 1991 Judgment, and the March 27, 1991 mandate. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a); the First District Court of Appeal is the highest court of Florida in which a decision could be had, in that a *per curiam* affirmance without opinion by a Florida District Court of Appeal negates any possibility of review by the Florida Supreme Court, *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).[1] *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 431, 104 S.Ct. 1879, 1881 (1984).

Petitioners have also brought a separate action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida, Miami Division, seeking to enjoin the payment of benefits. *Fuqua Industries, Inc. v. Tomlinson*, Case No. 91-0842-CIV-RYSKAMP (S.D. Fla.

[1] The First District Court of Appeal had jurisdiction of the workers' compensation appeal pursuant to § 440.271, Fla. Stat.

1991). That court has denied a motion for preliminary injunction. Petitioners are in doubt as to whether the Florida First District Court of Appeal considered the constitutional claims because the Judge of Compensation Claims held he did not have jurisdiction over constitutional issues and the First District affirmed *per curiam* without opinion. Because compensation judges do not have constitutional jurisdiction[2], the First District Court has expressed doubts about its ability to hear and determine constitutional issues arising from workers' compensation claims. *Sasso v. Ram Property Management*, 431 So.2d 204, 207 (Fla. 1st DCA 1983), approved 452 So.2d 932 (Fla. 1984), app. dism. 469 U.S. 1030, 105 S.Ct. 498, 83 L.Ed.2d 391 (1984); *Ortega v. Owens-Corning Fiberglas Corp.*, 409 So.2d 530, 532 (Fla. 1st DCA 1982). Thus Petitioners' presently-pending action in District Court may, or may not, be barred by the "Rooker-Feldman" doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), depending on whether that court (and this Court) believe that the issues below could have been adequately considered by the First District. *See, e.g., Wood v. Orange County*, 715 F.2d 1543, 1547, reh. den., 720 F.2d 1294 (11th Cir. 1983), cert. den., 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984). Rooker-Feldman places Petitioners in

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[2] E.g., *Rollins v. Southern Bell Telephone & Telegraph Co.*, 384 So.2d 650, 652-653 (Fla. 1980) (deputy commissioners do not possess constitutional adjudicatory powers because their function is to preside over administrative hearings).

a dilemma: where the final state appellate court doubts its ability to consider an issue which, in any event, could not be raised at the trial level, Petitioners are required to proceed both in this forum and in District Court so as to preserve the constitutional rights asserted.

The foregoing circumstances bring this case within the doctrine of *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623-624, 109 S.Ct. 2037, 2048 (1989), which held that "[w]hen a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts," which is Petitioners' situation, "we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requirements of a case or controversy are also met." The direct, specific, and concrete injury to Petitioners, and the existence of a "case or controversy," are addressed by the arguments *infra*.

CONSTITUTIONAL PROVISION INVOLVED

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

On April 4, 1986, Respondent Ruth Jandrucko was allegedly mugged and her purse stolen by a young black male, while she was in the course and scope of her employment. Her employer was Colorcraft Corporation, whose successor by merger is Petitioner Qualex, Inc. (hereinafter collectively "Colorcraft"). The workers' compensation "carrier" (within the meaning of Florida law) was Petitioner Fuqua Industries. Fuqua, on behalf of its subsidiary, Colorcraft, began paying workers' compensation benefits to Respondent Jandrucko.

In or about February 1987, notwithstanding her physical injuries and the resulting limitations, Respondent Jandrucko was physically capable of returning to full time employment but for a claimed *"post-traumatic stress disorder," consisting of a "phobia toward black persons"* (Appendix A, App. 4). Respondent Jandrucko was physically capable of returning to full time employment at that time *"provided she were first desensitized to black persons"* (Appendix A, App. 5).

Notwithstanding Respondent Jandrucko's claimed inability to adequately function in a working environment occupied by black persons, Petitioner Colorcraft was legally prohibited from providing for her a segregated working environment, 42 U.S.C. 2000e *et seq.*, and was not inclined to do so. Petitioner Fuqua suspended the payment of workers' compensation benefits to Respondent Jandrucko because she was capable of returning to full time employment absent her "irrational fear of black persons."

After the suspension of benefits, Respondent Jandrucko retained counsel and filed a claim for benefits

under the Florida Workers' Compensation Code, ch. 440, Fla. Stat., with the Division of Workers' Compensation, State of Florida, Department of Labor and Employment Security. Following a hearing on the merits, the Deputy Commissioner (now called Judge of Compensation Claims) ordered Petitioner Fuqua to provide monetary workers' compensation benefits from February 1987 to April 26, 1990 and continuing, all because of the inability to provide Jandrucko with a work environment, in the words of the Order, *"where she would be guaranteed not to come into contact with black males."*[3] The aforementioned Order was appealed to the Florida First District Court of Appeal. It was affirmed *per curiam* without opinion, and rehearing has been dismissed, thus exhausting all remedies available in the Florida state court system.

HOW FEDERAL QUESTIONS WERE RAISED AND PASSED ON BELOW

Petitioners first attempted to raise the constitutionality of Respondent Jandrucko's claim for benefits, based on her private discriminatory preference, in front of the Judge of Compensation Claims. At the final hearing, the Judge of Compensation Claims responded that he did not have the statutory ability to consider such constitutional issues sought to be raised by Petitioners.

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[3] Order, paragraph 15, App. 7. Jandrucko herself testified that she could not return to work unless Fuqua fired all of its black employees. (App. 20.)

> DEPUTY COMMISSIONER TOMLINSON: . . . *I don't have any jurisdiction over constitutional issues.* Those will have to be raised on appeal before a constitutional court. You understand that?
>
> [PETITIONER'S COUNSEL]: Yes, sir. But actually I think as it comes down to it, I think you do have the jurisdiction to make decisions if the constitutional law of the United States or the State of Florida controls. I think you have jurisdiction and, in fact, a responsibility to apply that law.
>
> DEPUTY COMMISSIONER TOMLINSON: I'll apply the applicable law. *I don't have any jurisdiction to rule on constitutional issues.* All right.

(App. 17-18).

The Order (App. 1) discusses a number of issues but, true to the Florida Judge's belief that he had no jurisdiction to consider these issues, it does not discuss or even mention the constitutional issues sought to be raised by Petitioners.

On appeal to the Florida First District Court of Appeal, Appellants again raised the constitutional issue, arguing that the Order "sponsors claimant's discriminatory conduct," citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989); *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017 (1983); *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804 (1973); *Loving v. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967); and *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948). In that appeal, Petitioners essentially argued that the state action ordering "payment of money on account of [Respondent's] racially motivated refusal to work" is "to

reward and encourage racially discriminatory conduct" in violation of the aforementioned authorities.

Respondent Jandrucko's Answer Brief cited no constitutional law construing the Fourteenth Amendment, and argued essentially that, notwithstanding her desire not to associate with black persons, counsel was "unable to comprehend the . . . contention that Ruth Jandrucko was racially biased."

Petitioners' Reply Brief pointed out that a finding of "bigotry" is not necessary to implicate the Constitution, as even sincerely-held discriminatory religious beliefs can lead to "constitutionally offensive racially discriminatory conduct . . . ", citing *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017 (1983).

The Florida First District Court of Appeal affirmed, *per curiam* without opinion, on February 25, 1991 (Appendix A, App. 13), thus making it impossible to determine what consideration the First District gave to Petitioner's federal constitutional arguments.

REASONS FOR GRANTING THE WRIT

The Judge of Compensation Claims relied almost exclusively on racial considerations in finding Respondent Jandrucko disabled because of her unwillingness to associate with blacks. At least since *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948), private discriminatory preferences (whether expressed by contract or otherwise) are

unenforceable in our system of law. A "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292 (1981). The Order (App. 1) sets forth a racial classification for the purpose of awarding benefits to Respondent as well as determining whether Petitioners were able to provide suitable employment to Respondent. The Petitioners are penalized for not being able to provide a job for Respondent "where she would be guaranteed not to come into contact with black males." Further, the Order below in essence approves of and rewards Respondent Jandrucko's private discriminatory preference. Jandrucko's discriminatory preference appears in the psychological garb of a "post-traumatic stress disorder." The Order endorses that discriminatory preference and embodies the force and effect of law in holding that discrimination provides a basis to require Petitioners to pay money to Respondent Jandrucko.[4]

The "state action" aspect of this case is manifest. The "actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1, 104 S.Ct. 1879, 1882 n.1 (1984). Further, the action of any adjudicatory body setting forth or approving a racial classification is

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[4] Unfortunately, Petitioners have been compelled under color of law to pay pursuant to the judge's Order. However, the Petitioners face further penalty under the Order consisting of additional claims, demands, and expenses.

> subject to the most exacting constitutional scrutiny; to pass constitutional muster, [such racial classifications] must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of its legitimate purpose, *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964). See *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967).

Palmore, 466 U.S. at 432-33, 104 S.Ct. at 1882. This "exacting scrutiny" requiring a "compelling governmental interest" is the kind of "strict scrutiny" which this Court has uniformly applied to racial classifications in the modern era. To our understanding, no racial classification of blacks has ever passed muster under the "strict scrutiny" standard – unless this case be the first.

As respondents did in *Palmore*, Respondent may argue here (as she argued emotionally below) that the welfare of Respondent, a now 65-year old white woman, is paramount when a psychologist has given her private discriminatory preference the imprimatur of scientific approval by characterizing it as a "post-traumatic stress disorder" and a "phobia." Nevertheless, this Court's review of the record will reveal[5] that Respondent's

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[5] This Court has considered itself duty-bound to "review the evidence . . . to determine whether it could constitutionally support a judgment. . . . The Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . " *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 728-29 (1964). *Accord, England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416-17 n.8, 84 S.Ct. 461, 465 n.8 (1964).

claimed "phobia" of blacks was a "phobia" directed only to blacks in the work place as it will be quite apparent that she was able to conduct the ordinary business of daily life – including shopping, walking the streets, and interstate travel – in proximity to black persons. Therefore, it will be apparent from the entire record that her claimed "phobia" for blacks extended itself, if at all, only to blacks in the work place – striking at the heart of Petitioner Colorcraft's legal duties under 42 U.S.C. § 2000e *et seq.*

Respondent Jandrucko's interest in receiving workers' compensation benefits does not rise to the level of "compelling governmental interests" which would pass "strict scrutiny." In *Palmore, supra,* the alleged welfare of a 3-year old girl, socially stigmatized by her black stepfather, was not a sufficiently "compelling governmental interest" to permit her natural father's private discriminatory preference to acquire the force of law and the enforcement of state action.

In this regard, it is significant that this Court in *Palmore* never questioned the scientific validity of the claimed social stigmatization of the 3-year old child. To the contrary, this Court accepted its occurrence as scientifically valid, noting that a white child living with a black stepfather was indeed "subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin." *Palmore,* 466 U.S. at 433, 104 S.Ct. at 1882. Thus it is of no constitutional import that Jandrucko's irrational fears are supported by a psychologist's imprimatur as the validity of the natural father's fears in *Palmore* were similarly supported. The mandate of the Constitution does not yield

even in these scenarios. In response to the claim that the 3-year old child's welfare was such a "compelling state interest" that a racial classification could be used in determining custody, this Court responded:

> The question, however, is whether *the reality of private biases and the possible injury they might inflict are permissible considerations* for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. [Footnote omitted.] The Constitution cannot control such prejudices but neither can it tolerate them. *Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.*

Palmore, 466 U.S. at 433, 104 S.Ct. at 1882 (emphasis added). Similarly here, *"the reality of* [Respondent Jandrucko's] *private biases and the possible injury they might inflict"* are not *"permissible considerations"* for the award of workers' compensation benefits. If the public policy of Florida mandates benefits for private racial bias, that public policy must yield to the Fourteenth Amendment.

Similarly, in *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017 (1983), the private university's religious belief – no matter how sincerely-held and no matter how strongly protected by the Free Exercise clause of the First Amendment – was not sufficient to overcome our government's "fundamental overriding interest in eradicating racial discrimination . . . that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. . . . The interests asserted by [Bob Jones University] cannot be accommodated with that

compelling governmental interest. . . . " *Bob Jones*, 461 U.S. at 604, 103 S.Ct. at 2035.

Here, the governmental interest in eradicating racial discrimination in the work place must substantially outweigh whatever burden the denial of workers' compensation benefits would place on Respondent Jandrucko's exercise of her own private discriminatory preference – no matter how sincere – a preference which cannot possibly rise to the dignity of the Free Exercise rights of Bob Jones University, which rights were found wanting to overcome the "strict scrutiny" standard.

Although these issues were briefed and submitted to the First District Court of Appeal, Respondent Jandrucko's briefing cited no constitutional cases, and the First District's *per curiam* affirmance without opinion renders it impossible to say what, if any, consideration was given to these issues. Certainly, if these federal questions were decided *sub silentio* by the First District, they were decided in a way which conflicts with *Palmore* and *Bob Jones*, and suggests (for the first time since the rejection of the doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)) an indirect avenue by which private discriminatory preferences may be given the force and effect of law.[6]

If the decision below stands, the Florida workers' compensation system will allow and enforce, under color

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[6] At least one other state court has committed similar error. *See, e.g., Boucher v. Orleans Parish School Board*, 346 So.2d 1124 (La. 4th Cir. 1977), which states that there is *no constitutional impediment* to awards for "fear of blacks" in the work place although evidence did not support same in that case.

of state law, monetary reward for the private discriminatory preferences of persons whose injuries can be associated with any member of any racial, ethnic or discernibly different minority group. The message of the Order awarding benefits is that, while Petitioners cannot be compelled to provide Respondent a work place where she would be "guaranteed not to come into contact with black males," Petitioners can be penalized and Respondent can be paid under color of state law because of a private discriminatory preference. Petitioners have been punished for failing to discriminate against blacks for Respondent's benefit; Respondent has been rewarded for her private discriminatory preference. By punishing Petitioners and rewarding Respondent in this manner, the Florida Judge of Compensation Claims, with the approval of the Florida First District Court of Appeal, gave judicial imprimatur and the force of law to the blight of discrimination, which the Fourteenth Amendment was designed to eradicate. The public interest in such issues can not be minimized, as it involves "principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423 (1923).

CONCLUSION

The Florida First District Court of Appeal's affirmance of the Judge of Compensation Claims' decision awarding benefits for Respondent Jandrucko's private discriminatory preference contravenes overriding federal constitutional and statutory policy. The First District

decided *sub silentio* the federal questions in a way conflicting with the applicable decisions of this court and, further, decided an important question of federal law which should be settled by this Court. Supreme Court Rule 10.1(c). Finally, the First District opinion sanctions and approves both payment and punishment on the basis of invidious racial discrimination.

For the foregoing reasons, Petitioners respectfully petition the Supreme Court to grant a Writ of Certiorari to review the Judgment of the Florida First District Court of Appeal.

Dated: May 10, 1991.

Respectfully submitted,

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STATE OF FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY OFFICE OF THE
JUDGE OF COMPENSATION CLAIMS DISTRICT "K"

CLAIM NO. 163 20 6245 D/A: 04/04/86

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ORDER

THIS CAUSE having come before the undersigned for merits final hearing, and the undersigned having fully and carefully considered all evidence before me, I hereby make the following findings of fact and conclusions of law:

1. That the undersigned has jurisdiction over the parties and the subject matter;

2. That venue properly lies in District K;

3. That issues to be determined were average weekly wage/compensation rate; TTD or TPD from 2/17/87 to date and continuing so long as appropriate, or, if the Claimant had attained MMI, then wage loss or PTD from 2/17/87 to date and continuing, if appropriate; attendant care from the date of accident to date and continuing; payment of the bills of Drs. Ronald Bergman and Barry Silverman and authorization of said physicians for ongoing future treatment; rehabilitation; penalties and interest on all late or unpaid installments of compensation; costs and attorneys' fees. The claim was defended on the grounds that no indemnity benefits were due; that the Claimant attained MMI with no impairment; that any physical and psychiatric problems she may have are unrelated to the accident of 4/4/86; that the Claimant voluntarily removed herself from the labor market and that she refused rehabilitation.

4. The parties stipulated to an average weekly wage/compensation rate of $297.90/$198.61 and that the Employer/Carrier had paid the Claimant TTD benefits from the date of her injury through 1/31/87 at the rate of $175.28. The parties also stipulated into evidence the deposition testimony of Paul A. Daruna, MD, Barry Silverman, MD., Dixie Taylor, an employee of ColorCraft and Nancy Lyman, the adjuster handling this file for Fuqua Industries. Live testimony was received from the Claimant, Harold Adams, Ronald Bergman, Ph.D. and Patricia Hubrig of Professional Rehabilitation. Several documents were received in evidence as exhibits, including a termination letter sent to the Claimant by the Employer and a resignation letter which the Employer

asked the Claimant to sign, but which she did not sign. I have had the opportunity to evaluate the candor and demeanor of the live witnesses who testified before me and to review thoroughly the deposition and documentary evidence herein.

5. Although I have not detailed all of the evidence presented, I have carefully considered same and find that the Claimant is a high school educated female, 63 years of age, who worked for the Employer since 1979, as a customer service representative and troubleshooter. Most of her daily work involved driving to various accounts on her route to set up promotional displays and to assist the staff of each account in servicing their customers who wanted film developed. Ms. Jandrucko and her supervisor, Harold Adams, testified that prior to 4/4/86 she was physically and socially active and was very well-liked by her co-workers. The evidence also show that Ms. Jandrucko interacted with ColorCraft's numerous black employees and had no apparent racial prejudices or fear of blacks.

6. The evidence shows, and I so find, that on April 4, 1986, the Claimant was mugged and her purse stolen by a young black male in the parking lot at one of her accounts. As a result of this attack, the Claimant suffered a fracture of the L-2 vertebra;

7. The Claimant was treated for this injury by Dr. Barry Silverman and others in his orthopaedic group. The vertebral fracture eventually healed in place and the Claimant was given physical therapy and injections for her ongoing pain.

8. In February, 1987, Dr. Silverman's office reported that the Claimant had sustained a 20% permanent disability of he [sic] body as a whole from her back injury. Her restrictions were as follows: Sitting no more that 2 hours; walking no more that 1/4 mile; very light lifting only; driving no more than short distances; minimal bending, pulling, pushing and squatting; full reaching; and working no more that four hours per day in a sedentary capacity.

9. Dr. Silverman testified that in January, 1988, he prescribed a lumbosacral corset for the Claimant due to ongoing pain, and that he admitted her to the hospital in April, 1988 for treatment of her continuing pain and sciatica. Dr. Silverman related this hospitalization and treatment to the original vertebral fracture. Dr. Silverman also testified that the Claimant still takes three different pain-killing medications.

10. Dr. Silverman also testified that the Claimant cannot perform heavy cleaning, cooking or strenuous household chores. He further testified that he was not asked by the Employer/Carrier to review any proposed job description for the Claimant and he did not opine as to what type(s) of work might be suitable for her from the orthopaedic standpoint.

11. Paul A. Daruna, MD testified via deposition that he evaluated that Claimant on September 14, 1988 and reviewed some of her medical records. He felt that she did suffer from post-traumatic stress disorder resulting from the accident herein and that she had developed a phobia toward black persons as a result of same. Dr. Daruna related that the Claimant had an irrational fear of

black men, and had trouble sleeping and horrifying nightmares due to the trauma she had sustained. Dr. Daruna recommended that she be encouraged to confront the phobic stimulus via progressive desensitization, biofeedback and, perhaps, medication. Dr. Daruna testified that he felt the Claimant could work provided she were first desensitized to black persons. He also testified that he felt the Claimant to be honest and not at all deceitful or malingering, and that the Claimant was not predisposed to be fearful of or prejudiced toward black persons.

Dr. Daruna also testified that the Claimant needs someone who understands what is going on with her to try to help her, little by little, to reintegrate with the normal society and that the Claimant does have potential to work again if she can be desensitized. He testified that the Claimant would like to be able to return to her normal functioning and that her religious background has oriented her toward work in a positive fashion.

12. Ronald Bergman, Ph.D., testified that he was initially authorized by the E/C to treat the Claimant for what he diagnosed as a post-traumatic stress disorder. He initially recommended six months of treatment because the Claimant was in severe psychological distress. She was constantly in fear of finding herself in a situation where she might have to come into contact with black males and had recurring, sudden "flashbacks" as if the mugging were happening again. Dr. Bergman testified that even when the Claimant knew, in a rational way, that she need not fear a particular situation, she still felt fear and demonstrated the physiological signs of that fear. He testified that the Claimant had rearranged her lifestyle so that she could avoid situations where she would have to

be out alone with her handbag, or where she would conceivably encounter black males. Dr. Bergman felt that the Claimant had become "hyper-vigilant" and became startled with even minor stimulus.

Dr. Bergman felt that the Claimant made progress with his treatment and in May, 1987, he opined that she might be able to return to some sort of work. He later realized, however, that he had been too optimistic about the Claimant's prognosis because the Claimant's condition regressed quickly after he stopped seeing her on a regular basis. Dr. Bergman testified that the E/C did not authorize any additional treatment, and since May of 1987 the Claimant's psychological condition has continued to deteriorate. Based upon his experience and his familiarity with the Claimant, Dr. Bergman opined that she has been unable to work since May, 1987, from the psychological standpoint and that she still requires ongoing treatment. I hereby accept the testimony of Dr. Bergman regarding the Claimant's diagnosis and her work status from February, 1987 forward as being consonant with logic and reason and as being grounded upon Dr. Bergman's familiarity with the Claimant. I reject the testimony of Dr. Daruna insofar as it conflicts with same.

13. The Claimant testified that she worked for many years prior to this accident and that she was raised in a deeply religious Mennonite family where prejudice toward others was forbidden and hard work was looked upon as inherently good. She testified that, since her injury, she has been unable to perform the heavier cleaning and cooking which she enjoyed doing pre-accident. She also testified that she has developed a fear of black

persons, more specifically young black males, and hesitates to go out in public alone or with her handbag. As a result, she tends to stay at home and only goes out when she can "plan" her outings in such a way that she is met at her destination by someone who watches her exit her car and who keeps an eye on her until she has completed her business and can get back in her car.

14. The Claimant also testified that her employment with the Employer herein was terminated in October, 1986. She also testified that her supervisor, Harold Adams, sent her letters in February, 1987 and October, 1987 advising her that work was available for her within her restrictions and limitations but that she did not feel capable of going out of the house to work because of her fear of encountering black males. She stated that she had not received any psychological counseling since Dr. Bergman's services were terminated and that the services of rehabilitation counselor Mariana Betancourt had been terminated in February, 1987 as well. The Claimant testified that she does want to return to the workplace as her job was a source of great satisfaction for her and she truly enjoyed her work.

15. Rehabilitation counselor Patricia Hubrig testified that since 1987, there have not existed any jobs in the open labor market in which the Claimant would be guaranteed that she would not come into contact with black males. I find Ms. Hubrig's testimony consonant with logic, reason and my own experience and hereby accept same.

16. The Claimant's supervisor, Harold Adams, testified that the Claimant was a good employee and was

well-liked by her colleagues. She was not prejudiced against any ethnic groups and in fact was quite friendly with many of her black co-workers prior to her accident. Mr. Adams testified that he was asked to write to the Claimant in February, 1987 and October, 1987 to advise her that the Employer had work available within her restrictions and limitations. Mr. Adams admitted candidly, however, that there was no such job available, nor could he imagine any job being created for the Claimant where she would be guaranteed not to come into contact with black males. Mr. Adams also testified that the Employer had no work for the Claimant that would not have required her to drive in excess of the limitations imposed by Dr. Silverman, as even the drive from her home to the Employer's office in Hollywood was too much.

Mr. Adams also testified that the adjuster, Nancy Lyman, asked him to prepare a letter for the Claimant to sign which stated that she was resigning for "personal reasons". Mr. Adams testified that he presented this letter to the Claimant but she refused to sign it because she had not asked to resign and did not want to resign. He felt that the Claimant was deeply hurt by this action as she considered herself to be, and was in fact, an extremely loyal and hardworking employee. I find Mr. Adams to be a credible witness and I accept his testimony.

17. Nancy Lyman, the adjuster handling the Claimant's file, testified that she is not licensed to adjust claims in Florida. Ms. Lyman denied having instructed Harold Adams to offer the Claimant work and to create a resignation letter for her to sign. She did admit, however, that

she unilaterally deauthorized Dr. Bergman without offering alternative psychological counseling and that she suspended rehabilitative services from February, 1987 to October, 1988. Ms. Lyman also stated that Dr. Silverman and his partners were never deauthorized. Based upon the testimony presented to me, I hereby reject the testimony of Ms. Lyman insofar as it conflicts with that of Harold Adams but I do accept that portion of her testimony wherein she admits that certain [sic] the services of Dr. Bergman and Mariana Betancourt were terminated unilaterally, as this aspect of her testimony was corroborated by testimony of witnesses whom I find to be believable. I reject Ms. Lyman's testimony that the Claimant told her she wanted to resign for personal reasons and I accept the Claimant's testimony that she did, and still does, want to return to the workforce and be gainfully employed. With regard to the authorization of Dr. Silverman, I find that he and his partners are the Claimant's authorized orthopedists and that any of his outstanding bills should be paid administratively per the applicable medical/surgical fee schedule.

18. In evaluating the evidence presented and in making my determination of law and fact thereon, I have carefully scrutinized the lay and expert testimony concerning the Claimant's pre- and post-injury physical and mental condition and the apparent lack of either pre-existing racial prejudice or predisposition to psychiatric illness. I am also fully cognizant of the potential for malingering or exaggeration of symptomatology when there is potential for financial gain and I have evaluated the evidence presented in a critical manner because I am aware of the real and present danger of illusory and

fictional claims. However, in the instant case the Claimant's psychological condition can be traced to a specific event which was completely different from the countless emotional strains that employees encounter daily without serious mental injury, and that the condition manifested itself relatively soon thereafter. I also find that there were no intervening post-injury incidents which might have tended to cause or exacerbate the Claimant's psychological condition. (*Cf. Greater Miami Academy v. Blum*, 466 So.2d 1263 (Fla. 1st DCA 1985), wherein the Claimant did not begin psychiatric treatment until a year after her injury and where she underwent several personal traumas in the interim). Therefore, it is my carefully considered opinion and finding that the Claimant sustained physical trauma arising out of and within the course and scope of her employment and that this physical trauma was, within a reasonable medical probability, the direct and proximate cause of the post-traumatic stress disorder which has rendered her incapable of gainful employment since the accident herein. I further find the Claimant to be a most credible and sincere witness who sincerely wishes to overcome the psychological condition that has prevented her from enjoying the active social and work life that she had prior to this accident, and that the Claimant is entitled to ongoing orthopedic, psychological and rehabilitative services.

19. Lastly, I find that attorney Renee R. Pelzman has rendered valuable services to the Claimant and that she is entitled to a reasonable attorneys fee for same, together with the taxable costs of this action.

WHEREFORE, it is ordered that:

1. The E/C shall adjust the Claimant's average weekly wage and compensation rate for all past compensation paid and for all compensation awarded herein and which may be paid in the future, together with penalties and interest thereon;

2. The E/C shall pay the Claimant temporary total disability benefits from February 17, 1987 to date and continuing so long as appropriate, together with interest thereon;

3. The E/C shall pay any outstanding bills of Dr. Bergman administratively, per the applicable medical/surgical fee schedule;

4. The E/C shall provide the Claimant with ongoing psychological counseling as the nature of her injury and the process of recovery require, for the time and in the manner prescribed by law;

5. The E/C shall pay the bills of Dr. Silverman and his partners administratively, per the applicable medical/surgical fee schedule;

6. Jurisdiction is hereby reserved as to the issues of attorneys' fees and taxable costs.

SO ORDERED this 26th day of April, 1990.

/s/ John G. Tomlison, Jr.
JUDGE OF COMPENSATION CLAIMS
JOHN G. TOMLISON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER was forwarded to the parties noted above on this 26th day of April, 1990.

on 4/27/90

/s/ P. Ricketts
Assistant to Judge of
Compensation Claims

RUTH F. JANDRUCKO
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FUQUA INDUSTRIES
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RENEE R. PELZMAN
235 ATRIUM BUILDING
1500 SANZ REMO AVE
CORAL GABLES FL 33146

STEVEN S. STEPHENS
P O BOX 3270
TAMPA FL 33601

/s/ P. Ricketts
P. Ricketts
Secretary to the
Judge of Compensation Claims

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

COLORCRAFT CORP. and FUQUA INDUSTRIES,

Appellants,

v.

RUTH JANDRUCKO,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 90-1598

Opinion filed February 25, 1991.

An appeal from a workers' compensation order, John G. Tomlinson, Jr., Judge of Compensation Claims.

Steven Scott Stephens of Alpert, Josey & Grilli, P.A., Tampa, for Appellants.

Renee R. Pelzman of Pelzman & Ruska, Coral Gables, for Appellee.

PER CURIAM.

AFFIRMED.

JOANOS and ZEHMER, JJ., and CAWTHON, Senior Judge, CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 20, 1991

CASE NO: 90-01598

L.T. CASE NO. 163-20-6245

Colorcraft Corp. and Fuqua Industries — v. Ruth J. Jandrucko

Appellant(s), — Appellee(s).

ORDER

Appellant's motion for rehearing en banc was not filed in conjuction with a Rule 9.330(a) motion for rehearing and is therefore a nonallowable motion under Rule 9.331 and is a nullity. State v. Kilpatrick, 420 So. 2d 868 (Fla. 1982), La Grande v. B & L Services, 436 So. 2d 337 (Fla. 1st DCA 1983). Accordingly the motion for rehearing en banc must be dismissed as an unallowable motion under Rule 9.331, Florida Rules of Appellate Procedure.

By Order of the Court

JON S. WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Steven Scott Stephens
Steven C. Davis

Wendy England
Renee R. Pelzman

/s/ Laurie Black
Deputy Clerk

[seal]

MANDATE

From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, John G. Tomlinson, Jr. Judge of Compensation Claims WHEREAS, in that certain cause filed in this Court styled:

Ruth F. Jandrucko

vs. Case No. 90-1598

ColorCraft Your Case No. 163-20-6245

Fuqua Industries

The attached opinion was rendered on March 11, 1991 YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Douglass B. Shivers Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 27th day of March, 1991

[seal]

/s/ Jon S. Wheeler
Clerk, District Court
of Appeal of Florida,
First District

[p. 11] employer/carrier is taking the position that the current problems are not attributable to the injury or in fact the psychological aspect of the problems we would take the position are not permissible as a matter of public policy and constitutional law. What we're saying quite simply, Your Honor, is that the –

DEPUTY COMMISSIONER TOMLINSON: Didn't y'all raise a lot of delicate issues up before the Court of Appeals at one time?

MR. STEPHENS: I can't –

MS. PELZMAN: Not in this case.

DEPUTY COMMISSIONER TOMLINSON: No, not in this case. In another case.

MR. STEPHENS: Are you referring to the firm I work for?

DEPUTY COMMISSIONER TOMLINSON: Yes, sir.

MR. STEPHENS: Because I haven't been there that long, that's why I can't answer.

DEPUTY COMMISSIONER TOMLINSON: I recollect the Court expounded on certain constitutional issues and delicate matters that were raised and what have you in a case involving your firm. I don't have any jurisdiction over constitutional issues. Those will have to be raised on appeal before a constitutional court. You understand that?

[p. 12] MR. STEPHENS: Yes, sir. But actually I think as it comes down to it, I think you do have the

jurisdiction to make decisions if the constitutional law of the United States or the State of Florida controls. I think you have jurisdiction and, in fact, a responsibility to apply that law.

DEPUTY COMMISSIONER TOMLINSON: I'll apply the applicable law. I don't have any jurisdiction to rule on constitutional issues. All right.

MS. PELZMAN: I don't know that any have been posed at this point, Your Honor. Certainly none were ever brought to my attention.

DEPUTY COMMISSIONER TOMLINSON: Well, we'll take it up in the three hours that's allotted.

Anything further on the pre-trial?

MS. PELZMAN: No, sir.

MR. STEPHENS: We wanted to amend the witness list to have –

DEPUTY COMMISSIONER TOMLINSON: In what respect?

MR. STEPHENS: To have the one lady Dixie Taylor, I believe is her name, testify. She's –

DEPUTY COMMISSIONER TOMLINSON: Without objection it'll be granted.

MS. PELZMAN: Well, the one thing I have to say though is that we had allotted three hours for this

* * *

[p. 201] A. Yes. And I'd have to come – well, there's black managers in the stores that I'd have to – and then there's also black customers that would come up and use the –

Q. Well, if we got a job within your physical limitations, would you be able to do it? Would you be able to take the job?

A. For my physical –

Q. Within your physical limitations.

A. How about mental? Or physical?

Q. I'm sorry, ma'am. I just asked you the question. That's all.

A. Okay. Physical.

Q. If there's a job within your physical limitations.

A. Yes. If you could find me a job within that and mental, yes.

Q. Are you telling me then that your mental – in your mind that your mental limitations stop you from finding a job altogether?

A. My mental.

MS. PELZMAN: Are you talking about at this time?

THE WITNESS: Yes, it would.

Q. (By Mr. Stephens:) And that's because you don't think there's any way that you can be guaranteed to not have to look at black people.

A. Black people.

[p. 202] Q. And that's because if Fuqua hired you back they'd have to fire every black in the place to take you back?

A. Yes. Probably wouldn't be able to handle it.

Q. When Mr. Alpert took you deposition – do you remember that?

A. Yes.

Q. Sparks flying and everything.

MS. PELZMAN: I'll object to the editorial comment, Judge, and move to strike.

DEPUTY COMMISSIONER TOMLINSON: Yeah. There's no reason to have editorial comments.

Q. (By Mr. Stephens:) There you mentioned the –

MS. PELZMAN: Object. Judge –

DEPUTY COMMISSIONER TOMLINSON: What's the objection?

MS. PELZMAN: I believe it's improper impeachment.

DEPUTY COMMISSIONER TOMLINSON: He hasn't even started yet. Go ahead.

MR. STEPHENS: All I intend to do is ask her what she said.

DEPUTY COMMISSIONER TOMLINSON: Go ahead. You know how to impeach a witness, I assume.

MR. STEPHENS: I guess I'll find out.

DEPUTY COMMISSIONER TOMLINSON: Yes, sir. You will.

Q. (By Mr. Stephens:) Before you mentioned the beauty

* * *